(4)

SUPREME COURT, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

No. 94-1077

In The

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, F. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION and THE ALLIANCE FOR AMERICA IN SUPPORT OF THE PETITIONERS

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for *Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

TABLE OF CONTENTS

Page

IDENTITIES AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

ARGUMENT 5

I. The Iowa Supreme Court Failed To Apply Properly This Court's Regulatory Takings Jurisprudence 5

II. The Iowa Supreme Court's Decision Concerning The Date When A Regulatory Taking Occurs Is In Direct And Irreconcilable Conflict With The Decisions Of This Court 9

III. Just Compensation Must Be Paid To A Landowner Whenever The Government Denies The Owner An Important Property Right 13

A. "Harm" That Is The Necessary Consequence Of The Cautious And Prudent Exercise Of An Acknowledged Right Does Not Constitute A Public Nuisance At Common Law 13

B. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Achieved Customarily Through Eminent Domain Proceedings 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) 7, 17

Ambler Realty Co. v. Euclid, 272 U.S. 365 (1926) 16

Andrus v. Allard, 444 U.S. 51 (1979) 8

Armstrong v. United States, 364 U.S. 40 (1960) 5

Averne Bay Construction Co. v. Thatcher, 15 N.E.2d 592 (1938) 18

Bostock v. Sams, 52 A. 665 (Md. 1902) 17

Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) 16, 19

Eaton v. B.C. & M.R.R., 51 N.H. 504 (1872) 13

Helfrich v. Catonsville Water Co., 74 Md. 269 (1891) 14

Hodel v. Virginia Surface Mining & Reclamation Assn. Inc., 452 U.S. 264 (1981) 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 17

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 15, 16, 17

Legal Tender Cases, 12 Wall 457 (1871) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7

Lucas v. South Carolina Coastal Council, 505 U.S. ___, 112 S. Ct. 2886 (1992) 4, 7, 8, 9, 11

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 12

McDougal v. County of Imperial, 942 F2d. 668 (9th Cir. 1991) 19

TABLE OF AUTHORITIES – Continued

Page

Morris County Land I. Co. v. Parsippany-Troy Hills Tp., 193 A.2d 232 (N.J. 1963) 18

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 17, 18

Northern Transportation Co. v. Chicago, 99 U.S. 635 (1879) 6

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978) 6, 17

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6, 14, 15

Rounds v. Mumford, 2 R.I. 154 (1852) 14

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 19

United States v. General Motors Corp., 323 U.S. 373 (1945) 9

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 6

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 12

STATUTES

Ancient Human Remains Statutes, Code of Iowa § 263 et seq. and § 716, ("AHRA") 2, 3

§ 614.1(4) Code of Iowa 10

CONSTITUTIONAL PROVISIONS

Fifth Amendment 4, 5, 20

Fourteenth Amendment 4, 6

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Supreme Court Rule 10 5

Supreme Court Rule 10.1(b) 5

Supreme Court Rule 10.1(c) 5

Supreme Court Rule 37 1

MISCELLANEOUS

Black's Law Dictionary 1551 (4th ed. 1968) 13

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, Mountain States Legal Foundation and The Alliance for America submit this brief *amici curiae* in support of Petitioners Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc. and Buck Construction Company, Inc. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, The Alliance for America ("Alliance"), is a fifty state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and policy interests, including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair. The Alliance is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amicus, Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state

of the country. A large number of MSLFs members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues.

As demonstrated herein, the implications of Petitioners' case far transcend their individual situations and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws for the ostensible protection of the environment, and in the administration of justice. *Amici* will present a broader perspective of the issues at stake in this case which will assist this Court so as to give clear guidance to lower courts in adjudicating cases such as this that involve important constitutional rights. Moreover, *Amici* believe that the Iowa Supreme Court has done violence to the precedents of this Court that recognize constitutional limitations on the powers of government.

STATEMENT OF THE CASE

This case involves the regulatory taking of real property suitable for the construction of a single family residence. In 1976, Iowa enacted the Ancient Human Remains statutes, Code of Iowa § 263 et seq. and § 716, ("AHRA"), that enable the state archaeologist to investigate, preserve, and reinter discoveries of human remains more than 150 years old. The AHRA was amended in 1978. In short, Iowa wishes to preserve its native American heritage, for present and future generations.

While the AHRA's stated goal is the preservation of ancient human remains, the means chosen to implement

this goal was an immediate and abrupt ban on all permanent construction, including dwellings, within mandated setback lines that totally engulfed the Petitioners' property. It is undisputed that the AHRA precluded the reasonable development and economically viable use of Petitioners' property.

In April 1991, just prior to excavation for the basement of a house, an unknown individual had the state archaeologist probe the property for ancient human remains. In one of twelve probes, the state archaeologist found approximately one cubic inch of human vertebrae and three other small fragments of vertebrae surfaces, plus five tiny unidentifiable bone fragments. The state archaeologist thereupon designated a 34 foot diameter "burial mound," with a 50 foot buffer zone, as a "significant find" under the AHRA and warned the landowner by letter of the criminal penalties concerning disinterment of the remains. This occurred despite the fact that this was the first find of ancient remains in Story County, Iowa, and despite the fact that no other artifacts were discovered that would indicate a burial site.

Petitioners then offered to move the remains, at their expense, to a site in a wooded city park. The state archaeologist refused to allow the move. The state archaeologist subsequently refused to disinter the ancient human remains and to reinter them in the special cemetery established under the Code of Iowa § 263.B.8. Petitioners' request was the functional equivalent of seeking a variance, as permitted by the AHRA. See Iowa Code § 263 B.7. As a result of this denial by the state archaeologist, Petitioners exhausted all of their state remedies. Petitioners filed suit in Iowa State District Court seeking

relief under the Fifth and Fourteenth Amendments to the United States Constitution on the basis that the aforementioned governmental action was a regulatory taking of their property without compensation. The District Court, and subsequently the Iowa Supreme Court, denied Petitioners just compensation for a taking of private property.

The Iowa Supreme Court, purporting to rely on this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992), denied the Petitioners just compensation since their property was purchased after the passage of the Ancient Human Remains statutes in 1976 and 1978. The Iowa Supreme Court incorrectly concluded that all property owners who purchase their property after the passage of the Ancient Human Remains statutes in 1976 are precluded from receiving just compensation for a regulatory taking under these statutes.

SUMMARY OF ARGUMENT

Supreme Court jurisprudence interprets the Takings Clause as requiring just compensation if a state deprives a property owner of all economically beneficial use of his property, as long as the prohibited uses were originally included in the property owner's title. In the instant case, because Iowa's established property and nuisance law did not prohibit Petitioners from constructing a single-family house in a residential area, these prohibited uses were included originally in Petitioners title. Therefore, the Takings Clause requires the State of Iowa to pay Petitioners just compensation.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court identifies factors the Court deems important to determining whether a petition for a writ of certiorari should be granted. Two sections of Rule 10.1 are applicable here.

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals.

Rule 10.1(b).

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(c). *Amici* submit that each of these factors calls for the granting of the petition in this case.

ARGUMENT

I. The Iowa Supreme Court Failed To Apply Properly This Court's Regulatory Takings Jurisprudence.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause was "designed to bar Government from forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This prohibition applies against the

States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

For over 130 years, it was believed that the Takings Clause only applied to actual physical invasion or appropriation of property. *Legal Tender Cases*, 12 Wall 457, 551 (1871); *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). However, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes laid this belief to rest when the Court embraced established the concept of "regulatory takings."

In *Pennsylvania Coal*, Justice Holmes recognized that if the rights included in the ownership of private property were subject to qualification pursuant to the police power, "the natural tendency of human nature [would be] to extend the qualifications more until at last private property disappear[ed]." *Id.*, at 415. These concerns brought forth the well-known rule of law that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

Unfortunately, Justice Holmes provided little guidance as to how to determine when a given regulation goes too far for purposes of the Takings Clause. Consequently, since *Pennsylvania Coal*, the Supreme Court has avoided using any set formula for determining when a regulation goes too far, instead preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

However, the Court has identified two situations where regulatory action will require just compensation without the case-specific, factual inquiry. The first situation includes regulations that compel the property owner

to suffer a physical invasion of his property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second situation is when a regulation denies a property owner all economically beneficial use of the property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

With respect to this second situation, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992) recently set forth the test for determining when the Taking Clause requires just compensation. In *Lucas*, the property owner bought two residential lots on a South Carolina barrier island with the intention of building single family homes similar to those on adjacent lots. These plans were shattered in 1988 when a new law established a "baseline" on the island and prohibited any construction of permanent habitable structures seaward of a line parallel to the "baseline." The state trial court determined that the "baseline" effectively barred the property owner from building any permanent habitable structures on the property and that this prohibition deprived the owner of any reasonable economically beneficial use of the property. Thus, the trial court awarded the property owner just compensation. However, the South Carolina Supreme Court reversed and ruled that just compensation is not required when a land use restriction is designed to prevent serious public harm.

On *certiorari*, the Court reversed the South Carolina Supreme Court. In an opinion by Justice Scalia, the Court ruled that a state can avoid compensation when a regulation deprives a landowner of all economically beneficial use "only if . . . the proscribed use interests were not part of his title to begin with." *Lucas*, 112 S. Ct. at 2899. Thus, the Court disagreed with the idea that property is held

subject to the "implied limitation" that the state may eliminate subsequently all economically valuable use. *Id.*, at 2900. Instead the Court ruled that confiscatory regulations that prohibit all economically beneficially use of land:

> cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id.

Therefore, if Petitioners have private property interests protected by the Takings Clause and the state archaeologists' application of the AHRA deprived Petitioners of all economically beneficial use of their real property, Iowa must pay just compensation if the prohibited uses were originally included in Petitioners' title.[1]

---

[1] In *Lucas*, Justice Scalia, relying on *Andrus v. Allard*, 444 U.S. 51 (1979), wrote that the takings analysis was different in cases involving personal property because the property owner "ought to be aware of the possibility that new regulation might render his property economically worthless." *Lucas*, 112 S. Ct. at 2899. But *Lucas* involved real, not personal property, so that statement was pure *obiter dicta*. In any event, this dictum is inconsistent with *Andrus* because if personal property could never be the subject of a "taking" then there would have been no reason for the Court in *Andrus* to discuss whether the challenged statutes took a "strand" or the whole bundle of rights. *Andrus*, 444 U.S. at 65-66. Thus, the holding in *Andrus* is that, because other strands remain intact, there was no taking – not that personal property could never be the subject of a "taking."

Nevertheless, in the instant case all the bundle of rights were taken. Therefore, the *Lucas* test applies.

At common-law, property is not so much the material thing, as the aggregate of rights that the law annexes to it. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In *Lucas*, the Court reaffirmed the common-law doctrine that certain strands among the bundle of rights are essential attributes of ownership, without which property itself could not exist. *Lucas*, 112 S. Ct. at 2901. These rights include the right to possess, use, and dispose of property. *United States v. General Motors Corp.*, 323 U.S. at 377.

Once it is determined that Petitioners were deprived of all economically beneficially use of their property, Iowa can avoid having to pay just compensation only if the proscribed uses were not included originally in Petitioners' property. *Lucas*, 112 S. Ct. at 2899. In this case, Petitioners were engaging in the lawful use of their property. The State of Iowa could have avoided taking Petitioners' property and the corresponding duty to compensate them by allowing the removal of the remains and reinterment elsewhere as contemplated by the AHRA. This would have served both the State's public purpose and respected Petitioners' constitutional right.

II. The Iowa Supreme Court's Decision Concerning The Date When A Regulatory Taking Occurs Is In Direct And Irreconcilable Conflict With The Decisions Of This Court.

The Iowa Supreme Court incorrectly established 1976 as the date of ripeness and the date of the taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978. The effect of establishing

1978 as the ripeness and the taking date is to preclude all existing property owners in the state from receiving any compensation for a regulatory taking under these statutes after 1983, since there is a five-year statute of limitations on an action for damage to real property. Section 614.1(4) Code of Iowa. All claims and actions for a regulatory taking by existing property owners under these statutes brought after 1983 would be barred improperly by the erroneous ruling of the Iowa Supreme Court.

The AHRA, on its face, did not immediately or directly regulate Petitioners' property. A family dwelling could have been constructed on the property anytime before the state archaeologist made a significant find and denied permission to rebury the remains in the special cemetery established for that purpose. If the state archaeologist had determined the find was not significant, a family dwelling could have been constructed on the property. If the state archaeologist had allowed the ancient human remains to be reburied in the special cemetery established for that purpose, a family dwelling could have been constructed on the property.

When the AHRA was enacted, no landowner in the entire state of Iowa had any notice that – in the Supreme Court's view – the statute applied to his property, and there was no way of knowing whether the state archaeologist would grant or deny permission to disinter and rebury any ancient human remains if and when the statutes were applied to his property. It is not until the state archaeologist takes the regulatory action under the AHRA, by denying permission to rebury the ancient human remains in the special cemetery established for that purpose, that a regulatory taking occurs under the

AHRA. In this case, the regulatory taking of Petitioners' property occurred after the purchase of Petitioners' property. Therefore, the regulatory taking comes within the purview of *Lucas*, which entitled these Petitioners to just compensation for the regulatory action of the state archaeologist decreeing the denial of permission to rebury the ancient human remains.

This Court in *Lucas* recognized that the "Fifth Amendment is violated *when* land use regulation . . . 'denies an owner economically viable use of his land.' " 505 U.S. at ___, 112 S. Ct. at 2894. (Emphasis Added.)

Further, the Court stated:

> We think, in short that there are good reasons for our frequently expressed belief that *when* the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. (Emphasis Added.)

The decision of the Iowa Supreme Court is contrary to the taking date, ripeness, and accrual of action rules established by the Supreme Court. The Iowa Supreme Court incorrectly would require a property owner to challenge the AHRA at the time it was passed, regardless of whether it has been, or ever will be, applied to a particular property. Existing Supreme Court precedents hold, in reference to a regulatory taking, that a taking has not occurred, and a case is not ripe for judicial review, until the government makes a final decision and thereafter fails to provide adequate compensation for the taking.

A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 190 n.11 (1985).

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

MacDonald, 477 U.S. 340 at 351 (1986).

Further, the Court has held:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In *Hodel v. Virginia Surface Mining & Reclamation Assn. Inc.*, 452 U.S. 264 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 et seq., effect a taking . . .

Williamson County, 473 U.S. at 186.

Therefore, a plaintiff's claim is ripe, and a regulatory taking has occurred when, but not until, the government makes a final decision that takes all economically viable use of the property and fails to compensate the plaintiff for the taking. The final decision of the State in this case did not occur until 1991 when the state archaeologist refused to disinter and rebury the ancient human remains. At that time in 1991, but not until then, was the case ripe for review or was there a taking. The majority decision of the Iowa Supreme Court erred in failing to find that the taking in this case occurred in 1991, which entitles these Petitioners to just compensation.

III. Just Compensation Must Be Paid To A Landowner Whenever The Government Denies The Owner An Important Property Right

A. "Harm" That Is The Necessary Consequence Of The Cautious And Prudent Exercise Of An Acknowledged Right Does Not Constitute A Public Nuisance At Common Law.

The maxim *sic utere tuo ut allenum non laedas* (use your property so as not to injure others) is one well established at common law, but simply begs the question as to what is an injury to others.[2] While damage that is remote (which seems to be the case here) never constitutes a public nuisance, not all proximate injuries constitute nuisances either. *Eaton v. B.C. & M.R.R.*, 51 N.H. 504,

---

[2] See *Black's Law Dictionary* 1551 (4th ed. 1968)

527 (1872). The problem is in determining what constitutes a legal injury to another. The reasonable use by a person of his or her own property or the "cautious and prudent exercise of a lawful right," *Rounds v. Mumford*, 2 R.I. 154, 162 (1852), does not constitute a public nuisance. As was stated eloquently more than a century ago in *Helfrich v. Catonsville Water Co.*:

> The reasonable and proper exercise of acknowledged right by one man, may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason.

74 Md. 269, 276 (1891).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) represents a classic application of this maxim. Echoing the common law maxim that, "The rights of the public in property are to be governed by the same rules of law as the rights of individuals," Justice Holmes, speaking for this Court, held that public agencies that had been so foolish as to acquire only surface rights to land supported by anthracite coal had no more right to the surface support, a distinct property right recognized under Pennsylvania law and owned by certain coal mines, than private individuals would when contracting under similar circumstances. 260 U.S. at 415.

While an exigency existed that warranted public intervention (certainly of much greater magnitude and immediacy than the situation in the present case) the harm caused by the mining of anthracite coal beneath public schools and streets was the necessary consequence of the mine owners' exercise of its mineral and support rights that the State of Pennsylvania had repeatedly

acknowledged as valid. Having once sanctioned the severance of the support estate from the surface, the State of Pennsylvania could not, without resorting to the power of eminent domain, frustrate the reasonable expectations thus engendered, even if their realization resulted necessarily in serious public harm.

Amici have no doubt that the State of Iowa's interest in preserving its heritage is a legitimate one, and for the sake of argument, we can assume it is as substantial as the State of Pennsylvania's interest once was in preventing mine subsidence beneath public streets or schools that had acquired only surface rights. Nonetheless, the Kohler Act in *Pennsylvania Coal* was held a taking because the "harm" caused in that case, whether to private persons or communities, was the necessary consequence of the mine owner's exercise of what had been repeatedly acknowledged by the State of Pennsylvania to be the mine owner's rights.

In the present case, Iowa has permitted the creation of Petitioners' residential lots, and it has permitted Petitioners to acquire them in public commerce with the reasonable expectation of constructing residential dwellings thereupon. While the errors of private individuals or public officials "cannot estop the [State of Iowa] from exercising its police power to abate activity akin to a public nuisance," *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 488 (1987), it has clearly given rise to certain expectations sufficiently bound up with the notion of property that Iowa must condemn them and pay for them before it effectively ousts Petitioners from their property and takes over its management.

While this Court has frequently applied the maxim *sic utere tuo ut allenum non laedas* to "a misuse or illegal use" of property, it has never allowed this term to be applied to prevent "a legal and essential use, an attribute of its ownership," *Keystone* 480 U.S. at 512 (Rehnquist, C.J., dissenting). *Amici* submit that the construction, or the rebuilding, of a house on an individual residential lot is not a public nuisance at common law, nor does it allow itself to be declared so by legislative fiat. As one court put it:

> Although there may undoubtedly be some uses of the land which are sufficiently injurious to others that their use may be prohibited, the normal development of the land for residential purposes is not one of them.

Burrows v. City of Keene, 432 A.2d 15, 21 (N.H. 1981).[3]

B. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Achieved Customarily Through Eminent Domain Proceedings.

As this Court has noted, another important factor to consider to determine whether a regulatory taking has occurred is the "character of the governmental action."

---

[3] No doubt Petitioners' common law rights have been modified somewhat by this Court's ruling in *Ambler Realty Co. v. Euclid*, 272 U.S. 365 (1926). But Petitioners' property is zoned for residential use, and the lots were created under the subdivision regulations of the State of Iowa. While zoning laws are restrictions on the use of land, the zoning laws here permitting residential use merely confirms the common law right already possessed by the Petitioners.

See Keystone, 480 U.S. at 495 (1987). At the far end of the spectrum is a physical invasion or confiscation of property for the benefit of the public. Such activities – for example, the condemnation of property to build public roads or create parks – clearly require compensation to be paid. The owner is ousted from his property.

The Iowa state archaeologist's decree has the effect of ousting the Petitioners from their property by extinguishing a fundamental attribute of ownership: the right to reasonably use the surface estate of one's own property. *See Agins*, 447 U.S. at 262, and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (both referring to fundamental rights tied to property ownership). As previously discussed, the right to build on one's own property is a basic common law right reserved to the people. *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902). *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.2 (1987) ("(T)he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' ").

In contrast to the interests at stake in many Supreme Court cases addressing regulatory takings, e.g. *Penn Central* (air rights) and *Keystone* (support or mineral estate), the state archaeologist's order destroys Petitioners' basic right to use the surface estate by building homes thereon. The Supreme Court has never concluded, and *amici* believe could not conclude under its own precedents, that all reasonable use of the surface estate may be denied completely without compensation.

On the other hand, the conservation area imposed by the state archaeologist's order indisputably destroyed all

economically viable use of Petitioner's land and, in effect, converted the parcel into a park for the benefit of the public. While the formation of such a park may well be in the public interest, Iowa cannot indirectly accomplish through regulation what it must otherwise do through condemnation. *See Nollan*, 483 U.S. at 834, 841-42 (requiring grant of an easement would be a taking; improperly conditioning a building permit on such a grant is also a taking).

Indeed the purposes of the archaeological zone are not all that dissimilar to the purposes of a floodplain ordinance declared invalid by a unanimous Supreme Court in *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.*, 193 A.2d 232 (N.J. 1963) in which an oft-cited passage from *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d 587, 592 (1938), was quoted to the effect that:

> An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.

Morris County, supra, 193 A.2d at 242 (emphasis in original).

As was the case with *Morris County*, the contemplated use under the archaeological zone is of a public or quasi-public nature, and it may be argued that the "prime

object of the [zone] regulations is to retain the land substantially in its natural state." 193 A.2d at 239. *Cf. McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991) (owner deprived of economically viable use of property by floodplain designation properly states a claim for inverse condemnation).

Similarly, a unanimous New Hampshire Supreme Court in *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981) had no trouble finding that a zoning ordinance that placed a portion of the property owner's land in an undevelopable "conservation zone" constituted a taking. While that court cited to the usual balancing tests and the difficulty in some cases of deciding when a regulatory taking has occurred, it easily concluded that the case before it *"does not lie anywhere near the line"* and held the ordinance to constitute a taking. *Id.* at 20 (emphasis added). Indeed, the *Burrows* Court went on to chastise public officials "who have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual," *id.*, and that inverse condemnation awards, even for a temporary taking, for confiscatory regulations such as the one in that case should "encourage such officials to stay well on the constitutional side of the line [citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J. dissenting)] and should also *discourage harassment of property owners* by repeated amendments of zoning regulations and the enactment of new ones." 432 A.2d at 20 (emphasis added.)

This Court should not allow Iowa and other governmental bodies to avoid the constitutional requirement of

compensating landowners whose property is put to public use. Indeed, it is only of recent vintage (and dwindling public finances) that governmental bodies have sought, in the name of environmental or cultural and historic protection, to circumvent their eminent domain powers and take an individual's property via confiscatory prosecutions and regulations such as the Iowa state archaeologist's order.

CONCLUSION

The Iowa Supreme Court is profoundly mistaken in its analysis of Supreme Court Fifth Amendment jurisprudence. *Amici* submit that the Iowa Supreme Court's bizarre opinion represents the zenith of judicial activism, is bad law, has no place in federal jurisprudence, and merits prompt review.

Respectfully submitted,

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244
Attorneys for Amici Curiae